



**Liberty Mutual Insurance**

Commercial Insurance Property Claims

Mailing Address:

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VIA EMAIL QuinlanT@witkoff.com

December 12, 2023

Tim Quinlan  
Brook NY Residential LLC  
233 Broadway, Suite 2301  
New York, NY 11279

RE:	Insured:	Brook NY Residential LLC
	Loss Location:	565-589 Fulton St., Brooklyn NY 11201
	Date of Loss:	07/26/2022
	Policy Number:	MK2-L9L-474342-012
	Policy Effective Dates:	04/20/2022 to 07/11/2025
	Claim Number:	821443510
	Underwriting Company:	Liberty Mutual Fire Insurance Company

Dear Mr. Quinlan:

This letter is to inform you that we have conducted an investigation of your claim for project delay at the above-referenced location. We have completed our review of the information provided by you or on your behalf and conducted an on-site inspection. The following is a summary of our findings and position on coverage for the claim asserted.

The insurance policy issued to Brook NY Residential LLC provides coverage subject to the policy terms and conditions. Based on our investigation and review of the policy, there is no coverage available for your loss as outlined below.

## **THE CLAIM**

Our first notice of loss was on 04/25/2023. It was reported that in July 2022, supportive excavation was started on the SW corner of the site near the transit authority station. Optical monitoring was set up to determine if any movement was crossing a pre-determined threshold. Cracking was noticed in the transit authority subway station that exceeded the threshold and site was shutdown.

Our investigation of your claim revealed the following relevant information:

- This claim with reported date of loss of 07/26/2022 was reported to us on 04/25/2023, which is over 9 months from the reported date of loss.
- On or about July 26, 2022, during the installation of foundation elements at the site, the continuous optical monitoring system installed for the site recorded displacement at the

New York City Transit Authority (NYCTA) entrance structure which is located adjacent to the loss location.

- On or about September 8, 2022, measured displacement at the structure worsened.
- On September 12, 2022, NYCTA issued a stop work order for project construction. As a result of the stop work order, foundation construction at the project was delayed.
- No physical damage at the loss location was incurred.

We retained the services of Eric Cunningham from MKA International, Inc and requested he determine the cause of reported displacement of the New York City Transit Authority entrance structure. Mr. Cunningham inspected the location on July 19, 2023. A copy of his report is enclosed for your review.

On page 12 of 15 on Mr. Cunningham's report, he concluded the following:

### **Analysis and Conclusions**

"Based on evaluation of the documentation provided, displacement of the NYCTA entrance structure occurred as a result of construction activities at the Project site. We found no evidence that the ground conditions materially differed from those anticipated in the Langan Geotechnical Report, nor were there indications that a fortuitous event caused the measured displacement at the NYCTA entrance structure.

In early September, multiple SREs were installed in close proximity to the NYCTA entrance structure. Daily reports indicate that the working grade at the SRE installation was at approximately elevation +25-feet, the same elevation as the bottom of the NYCTA entrance structure foundation. The installation of the SREs resulted in soil disturbance (more likely than not due to vibration), resulting in displacement of the structure on or about September 12, 2022. As a result of the displacement of the structure, NYCTA issued a partial stop work order impacting the construction schedule and necessitating the design and installation of protective measures."

## **THE POLICY**

With regard to your Policy, we refer you to the following relevant provisions contained in the **BR 00 01 01 19 Builder's Risk Coverage Form Section A. Coverage:**

...

### **A. Coverage**

1. Subject to the Limits of Liability and Sub-Limits of Liability shown in the **Declarations** and all other Policy provisions, we will pay for direct physical loss or damage to **covered property** caused by a **covered cause of loss** while such **covered property** is:

- a. At the **project site**;
- b. In transit; or
- c. At a **temporary offsite location**.

...

We also refer you to the following relevant provisions contained in the **BR 00 01 01 19 Builder's Risk Coverage Form Section C. Exclusions:**

...

**C. Exclusions**

**2. We will not pay for:**

**a. Consequential Loss**

Loss, damage, cost or expense caused by, resulting from, or attributable to any of the following:

- (1)** Loss of market or loss of use;
- (2)** Liquidated damages, performance penalties or penalties for non-completion, except as provided under Section **E.**, Coverage Extensions, Contract Penalties;
- (3)** Non-compliance with contract conditions;
- (4)** Delay in completion of construction, except as provided under Time Element coverage, if endorsed to this Policy; or
- (5)** Re-sequencing or inefficiencies of construction activities.

**b. Cracking and Settling**

Loss or damage caused by, resulting from or attributable to normal or expected subsidence, settling, cracking, expansion, contraction or shrinkage of walls, floors, ceilings, buildings, foundations, patios, walkways, driveways or pavements.

But if loss or damage caused by a **covered cause of loss** results, we will pay for the resulting loss or damage caused by that **covered cause of loss**.

...

**g. Faulty, Inadequate or Defective Workmanship or Design**

Loss, damage, cost or expense caused by or resulting from faulty, inadequate or defective:

- (1)** Planning, zoning, development, surveying, siting;
- (2)** Design, specifications, workmanship, repair, construction, renovation, remodeling, grading or compaction;
- (3)** Materials used in repair, construction, renovation, remodeling, grading or compaction; or
- (4)** Maintenance;

Of part or all of any property on or off the **project site** described in the **Declarations**.

But if loss or damage caused by a **covered cause of loss** results, we will pay for the resulting loss or damage caused by that **covered cause of loss**. However, in no event will we pay for the **covered property** that was faulty or defective; the costs or expense to improve or redesign the original materials; supplies, designs, plans or specifications; or to improve workmanship.

The mere existence of any faulty, inadequate or defective condition listed in paragraphs **g.(1).** Through **g.(4).**, above, is not direct physical loss or damage.

...

...

## APPLICATION OF POLICY

In an effort to alert you to the basis of the denial of coverage, we list below the grounds under which all aspects of the claim are not covered under the policy. It is our intent to incorporate by reference all of the terms of the policy through this denial of coverage letter. Based upon the information available to date, the grounds for the denial of coverage under the policy, or under applicable law, with respect to the claim, include, but are not limited to, the following:

MKA International reports that there was no direct physical damage to the loss location. They report that the installation of the SREs resulted in soil disturbance (more likely than not due to vibration), resulting in displacement of the structure on or about September 12, 2022, when the stop work order was issued. The policy does not cover loss or damage caused by, resulting from or attributable to normal or expected subsidence, settling, cracking, expansion, contraction or shrinkage of walls, floors, ceilings, buildings, foundations, patios, walkways, driveways or pavements.

The policy does not cover loss caused by the work stop order. It states any delay in completion of construction due to a consequential loss is not covered.

Based on the above we find no coverage under the terms and conditions of your policy for the costs claimed in connection with your asserted claim and therefore deny your claim. In view of the absence of coverage, we make no comment relative to the amount of loss or damage but include those issues within the rights reserved.

If you have any questions about the content of this letter or the terms and provisions of your policy of insurance, please do not hesitate to call me.

The foregoing is not intended to waive any defenses which are now, or which may hereafter become available to us. The foregoing does not constitute a waiver of any term, condition, or exclusion of the insurance policy or any rights and defenses under the policy, and we hereby expressly reserve all of our rights and defenses thereunder.

Should you wish to take this matter up with the New York State Department of Financial Services, you may file with the department either on its website at <http://www.dfs.ny.gov/consumer/fileacomplaint.htm> or you may write to or visit the Consumer Assistance Unit, Financial Frauds and Consumer Protection Division, New York State Department of Financial Services, at: 25 Beaver Street, New York, NY 10004; One Commerce Plaza, Albany, NY 12257; 163B Mineola Boulevard, Mineola, NY 11501; or Walter J. Mahoney Office Building, 65 Court Street, Buffalo, NY 14202

We also refer you to **CM 00 01 09 04 COMMERCIAL INLAND MARINE CONDITIONS, GENERAL CONDITIONS**. It states:

### C. Legal Action Against Us

No one may bring a legal action against us under this Coverage Part unless:

1. There has been full compliance with all the terms of this Coverage Part; and

2. The action is brought within 2 years after you first have knowledge of the direct loss or damage.

If you have any questions, please contact me at 972-489-8363.

Sincerely,

A handwritten signature in black ink that reads "Marshall Lafon". The signature is written in a cursive, flowing style.

Marshall Lafon, CPCU, AIC, AIS, SCLA  
General Adjuster  
Liberty Mutual Insurance  
972-489-8363  
[Marshall.Lafon@libertymutual.com](mailto:Marshall.Lafon@libertymutual.com)

Enclosure: MKA International, Inc – Engineering Evaluation Report

cc. AON Risk Services Northeast, Inc  
1 Liberty PLZ Ste 3201, New York, NY 10006-1404